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No. 06-10119

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In The

Supreme Court of the United States

ALLEN SNYDER,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of *Certiorari* To The Louisiana Supreme Court

BRIEF OF *AMICUS CURIAE* CORNELL DEATH PENALTY PROJECT IN SUPPORT OF PETITIONER ALLEN SNYDER

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INTEREST OF *AMICUS CURIAE*

The Cornell Death Penalty Project is an undertaking of the Cornell Law School. One of the Project's primary goals is to address questions of law that carry important implications beyond the facts of any particular case and that involve the basic fairness of the death penalty's administration. Since its inception, the Project has had a particular interest in the influence of racial discrimination on the imposition of the death penalty. *See Turner v. Murray*, 476 U.S. 28, 35 (1986) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.") The Project's approach to these questions of basic fairness, including questions of racial fairness, is informed to the greatest extent possible by reliance on empirical studies of, and relevant to, the capital sentencing process. The Project accordingly seeks to intervene as *amicus curiae* in selected cases presenting important questions of law on which its expertise and experience may be useful to this Court.[1]

I. Introduction and Summary of Argument

Allen Snyder, a black man, was convicted and sentenced to death by an all-white jury for the murder of his wife's male companion. Prior to trial, the prosecutor was quoted in the media as referring to this case as his "O.J. Simpson case," behavior of which the trial judge was aware prior to jury selection because defense counsel twice

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[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity other than amicus curiae and its associated faculty made a monetary contribution to the preparation or submission of the brief in support of the petition. Counsel for both petitioner and respondent consent to the filing of this *amicus curiae* brief.

moved the court to forbid further such racially inflammatory comments. During voir dire, the prosecutor peremptorily struck all five African Americans who had survived cause challenges. Several of his explanations for those strikes cannot be squared with his failure to strike similarly situated white jurors. Then, in summation, he urged the all-white jury he had created to impose death because the Snyder case was like the O.J. Simpson case, where the defendant "got away with it." Despite the egregiousness of the prosecutor's conduct, the Louisiana Supreme Court affirmed the conviction. This Court vacated and remanded for reconsideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005) (hereinafter "*Miller-El II*"). Nonetheless, the Louisiana Supreme Court once more affirmed the conviction.

The lower courts' responses, in various cases, to this Court's *Miller-El* remands present the ugly specter of racially motivated resistance. In *Miller-El v. Cockrell*, 537 U.S. 322 (2002) ("*Miller-El I*"), this Court reversed the Fifth Circuit's decision upholding the district court's denial of a certificate of appealability, and in the process of doing so, laid out specific facts and principles that the Fifth Circuit should consider on remand. Instead, the Fifth Circuit gave short shrift to this Court's careful *Miller-El I* opinion, and affirmed the denial of Miller-El's *Batson v. Kentucky*, 476 U.S. 79 (1986) claim. This Court granted certiorari again, and once more reversed and remanded. *Miller-El II*, 545 U.S. 231.

The Fifth Circuit's resistance to this Court's *Batson* jurisprudence has been mimicked in this case.[2] In *State v.*

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[2] *Hightower v. Terry*, 459 F. 3d 1067 (11th Cir. 2006), *cert. denied*, ___ U.S. ___ (2007), provides another example of lower court defiance. Despite this Court's instruction to the Eleventh Circuit to reconsider its decision in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005), that court held that "*Miller-El* does not control our decision" and that "our opinion

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Snyder, 942 So. 2d. 484 (La. 2006) ("*Snyder III*"), the lower court purported to follow this Court's remand order, and quietly, but still obdurately, deviated from the principles laid down in *Miller-El II*. This recalcitrance is particularly shameful in light of the prosecutor's deliberate and premeditated racial purge of the jury, a purge aimed at securing a receptive audience for his racially inflammatory closing argument.

II. The Prosecutor's Premeditated Racial Manipulation of the Jury Demands Condemnation.

At the pretrial hearing defense counsel argued that the prosecutor's public comparison of Mr. Snyder's case to O.J. Simpson's case was designed "[t]o play upon these fears and prejudices to what will doubtless be an overwhelmingly – if not all – white jury deciding a case with admitted similarities is an appeal to racism at worst and vigilante justice at best, and as such is specifically precluded by Louisiana law." R. 160. This prediction turned out to be prescient, and her protest in vain.

When Mr. Snyder's prosecutor turned to jury selection, he did not stop thinking about race. Sometimes, when a prosecutor strikes a black juror and states a reason that comparative juror analysis shows is not the true reason for the strike, it is difficult to know whether the prosecutor has deliberately acted on the basis of race and attempted to conceal his motivations, or whether he has responded to unconscious stereotypes about racial groups so that the influence of race on his actions is not apparent to him. *See*

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in *Hightower v. Schofield* is accordingly reinstated." *Hightower v. Terry*, 459 F.3d 1067, 1069, 1072 (11th Cir. 2006) (Appendix A). Judge Wilson protested that the majority's decision "violates the Supreme Court's express mandate." *Id.* at 1078 (Wilson, J., dissenting).

Batson v. Kentucky, 476 U.S. 79, 106 (Marshall, J., concurring) ("Nor is outright prevarication by prosecutors the only danger here . . . A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically). In many cases, however, a review of the entire record excludes the second possibility. This is such a case.

Indeed, this is a case where not only conscious motivation to strike must be inferred, *see* Point III, *infra*, but where it is obvious that the prosecutor consciously struck black jurors in order to facilitate his presentation of a racially charged and wholly improper closing argument. After Mr. Snyder had been indicted, the prosecutor made public statements comparing Mr. Snyder's case to the O.J. Simpson case. The defense filed a motion in limine to preclude the prosecutor from making similar remarks in the future. R. 159-61. As defense counsel explained to the court, "References of the kind referred to above serve no purpose other than as an attempt to confuse and prejudice the jury." R. 160. The prosecutor then deflected an adverse ruling with the representation that he would not mention the O.J. Simpson case "during the course of the taking of evidence or before the jury in this case." R. 418-19.

In hindsight, it is clear this representation was simply a lie. Following the trial court's denial of Mr. Snyder's motion, the prosecutor continued to make remarks to the media concerning his "O.J. case," which led to another defense motion, this one more broadly aimed at prohibiting the attorneys in the case from making any comments to the media. R. 179-80. At the hearing on that motion, defense counsel reported that the previous day she had been asked by a television news reporter to comment "on the second O.J. Simpson case that was scheduled to go to

trial in Jefferson Parish today." R. 478. The prosecutor did not deny or disavow his comments, but demurred that the sequestered jury would not be exposed to publicity, R. 477, and then claimed that he had no intention of discussing the case with the media during the course of the trial. R. 479. Once more, the prosecutor's representations satisfied the trial court, and it denied the motion. R. 479.

This time, the prosecutor's assurances concerning his own future conduct were literally true, but still, just as prevaricating as his response to defense counsel's first motion. Although he made no more comments to the media, what he did was worse: He addressed similar, but even more objectionable comments directly to Mr. Snyder's jury. During his final argument to the jury, the prosecutor urged the jury to sentence Mr. Snyder to death because O.J. Simpson "got away with it":

> [Defense counsel] tried to describe this man as being the man who – And it was 12 hours later when he called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of –

At this point, defense counsel objected, but the trial court overruled her objection, and the prosecutor continued:

> The most famous murder case, and all of you all have heard about it, happened in California very, *very, very similar to this case*. The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, *he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that was what that man*

> *was thinking about when he called in and claimed that he was going to kill himself?*

R. 1591-93 (emphasis supplied).

After the jury returned with a sentence of death, R. 1598, Mr. Snyder filed a motion for new trial. The motion urged that the trial court's erroneous *Batson* rulings required vacation of the conviction and death sentence, R. 199-201. During argument on the motion, defense counsel linked the prosecutor's O.J. Simpson argument with his racially motivated exercise of his peremptory challenges, pointing out that the prosecutor was able to make the O.J. comparison only because he had rid the jury of African Americans. R. 1618. Defense counsel also explained what would seem to be obvious – the racially divisive nature of the prosecutor's O.J. Simpson argument:

> [Y]ou'd have to be in a cave for the last couple of years to not know, and the prosecutor knew exactly what he was doing, to not know that most white people, this was an all white jury, believed that O.J. Simpson was guilty as hell, and that he was getting away with murder, you know. And it's outrageous for the prosecutor to analogize to that case, to this case, which has nothing to do with it . . . [a]nd to hammer this man down, and to get a jury to say, That's right, you know, O.J. Simpson got off, this guy is trying to get off, he's like O.J. Simpson, you know, but we weren't on that jury in California, but we're on a jury here, we can do something about it. And that's totally outrageous.

R. 1617-18.

The Louisiana Supreme Court's *Snyder III* majority dismissed these pretrial comments and penalty phase remarks as irrelevant to the assessment of whether the prosecutor intended to discriminate when he cleared the

jury of all African American potential jurors. First, the Court defended the prosecutor's argument that Snyder should be put to death because O.J. Simpson "got away with it," as a proper response to defense counsel's statement in closing argument that Mr. Snyder had been suicidal when police officers arrived at his home. *Snyder III*, 942 So. 2d at 499. This construction of the prosecutor's remarks failed to note that the prosecutor made similar pretrial comments to the media, which hardly could be responsive to defense counsel's closing argument. The Court also ignored the fact that any argument that Snyder was feigning suicide in response to Simpson's acquittal was factually insupportable, given that Snyder's suicidal behavior occurred weeks *before* Simpson was acquitted.[3]

The majority then concluded that the prosecutor's O.J. Simpson comments did not evince any discriminatory intent, a conclusion facilitated by an astonishing denial of racial realities in this country:

> [O]ther than suggesting inferences to be drawn from the bare facts of the prosecutor's remarks, both prior to and subsequent to the voir dire, defense counsel points to no evidence in the record to substantiate defendant's claim of discriminatory use of peremptory challenges. The inferences defense counsel suggests are no more compelling than other race neutral inferences to be drawn when one considers the prosecutor's remarks in context. The remark at the motion in limine [sic] referred to the fact that the Simpson trial involved alleged domestic violence; the remark during rebuttal referred to the fact that

[3] The O.J. Simpson verdict was returned on October 3, 1995.

> Simpson feigned suicidal intent. *Neither remark referred to Simpson's or Snyder's race.*

Id. at 499 (emphasis supplied).

But the O.J. Simpson analogy had to be aimed at jurors who were familiar with the O.J. Simpson case; it would have been meaningless to anyone else. And it is hard to believe that anyone in America aware of that case did not know that Simpson was black. It is impossible to believe that the jury failed to notice Snyder's race. It is impossible to believe that a prosecutor who struck all of the qualified African American venirepersons was unaware that he had an all-white jury before him, or unaware that an all-white jury would respond more sympathetically to the O.J. Simpson analogy.[4]

The prosecutor's premeditated strategy of purging one racial group and appealing to the racial biases of another was constitutionally intolerable. The Louisiana Supreme Court's "see no evil" response to that intolerable conduct is inexcusable, and warrants correction by this Court.

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[4] Defense counsel's assertion that, in general, African Americans and whites saw the O.J. Simpson case in very different ways, is beyond dispute, and was widely discussed at the time. *See, e.g.*, Martin Gottlieb, *Not Guilty: the Racial Prism; Racial Split at the End, as at the Start,* THE NEW YORK TIMES, 10/4/05.

Research into the communication of racial prejudice confirms that in many settings, explicitly racist comments are rare, due to constraints imposed by widespread acceptance of the norm of equality. Instead, racist evaluations and conclusions are toned down. Speakers with a racial message describe negative acts, leaving the racist conclusions implicit. Teun A. Van Dijk, COMMUNICATING RACISM: ETHNIC PREJUDICE IN THOUGHT AND TALK 48 (1987).

The use of examples – such as the O.J. Simpson analogy made by the prosecutor in this case – to communicate racial messages is common. *Id.* at 90-91.

III. The Louisiana Supreme Court Defied This Court's Order.

Snyder III does not flaunt its defiance of this Court. The Louisiana Supreme Court does not disavow the relevance of *Miller-El II*, does not reinstate its prior decision, and even purports to reconsider that prior opinion in light of *Miller-El II*. Nonetheless, a comparison of this Court's *Miller-El II* opinion and the *Snyder III* opinion makes plain the Louisiana Supreme Court's recalcitrance.

On its first review of Mr. Snyder's claims, the Louisiana Supreme Court denied Mr. Snyder's *Batson* claims by a 5-2 vote, dismissing the strikes of the first two black jurors because defense counsel failed to contemporaneously object to them, then rejecting his related ineffective assistance of counsel claims on the ground that he could show no prejudice from a *Batson* violation, and rejecting his other three *Batson* claims by deferring to the trial court's unexplained rulings, and ignoring the prosecutor's O.J. Simpson analogies. *State v. Snyder*, 750 So. 2d 832 (1999) ("*Snyder I*").

After this Court vacated and remanded *Snyder I*, directing the Louisiana court to reconsider Mr. Snyder's *Batson* claims in light of *Miller-El II*, *Snyder v. Louisiana*, 545 U.S. 1137 (2005), a slimmer majority adhered to prior holding. Although that majority acknowledged the requirement that it review Mr. Snyder's "*Batson* complaints cumulatively in light of the entire record as directed by *Miller-El*," *Snyder III*, 942 So. 2d at 486, it nonetheless concluded that *Miller-El II* "do[es] not require a detailed reconsideration of the voir dire of the five African-American prospective jurors peremptorily struck by the State." *Id.* at 492.

Instead of carefully considering all of the evidence before it, the majority found a reason to dismiss each piece, ignoring the fact that none of those reasons can be squared with this Court's opinion in *Miller-El II*. The majority deferred to the trial court's acceptance of the prosecutor's proffered reasons, even though the Louisiana Supreme Court had previously chastised the judge who credited those reasons for his careless treatment of *Batson* challenges in another capital case, *see State v. Jacobs*, 789 So. 2d 1280, 1283, n. 2 (La. 2001), and even though the prosecutor who proffered those reasons had his credibility tarnished in a previous capital case.[5]

Mr. Snyder argued that the Jefferson Parish District Attorney's Office had practiced race discrimination in jury selection in the past, citing cases previously decided by the Louisiana Supreme Court,[6] a statistical analysis conducted

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[5] The prosecutor was involved in the suppression of material exculpatory evidence in *Kyles v. Whitley*, 514 U.S. 419 (1995), a fact that was brought to the attention of the Louisiana Supreme Court during oral argument.

[6] *See State v. Harris*, 820 So.2d 471, 474 (La. 2002) (finding *Batson* violation where Jefferson Parish prosecutor explained that she was striking African-American juror because he was a "single black male on the panel with no children. . . . I don't want him relating to the defendant more so than he would the State's part of the case"); *State v. Jacobs*, 789 So. 2d 1280 (La. 2001) (though reversing on other grounds, rebuking the same judge who presided over Snyder's trial for the careless manner in which he considered the defendant's *Batson* challenges); *State v. Myers*, 761 So. 2d 498 (La. 2000) (reversing on the ground that the trial court erred in failing to address the defendant's *Batson* challenges to the State's peremptory striking of six of seven African Americans venirepersons). *See also State v. Bridgewater*, 823 So.2d 877 (La. 2002) (all-white jury seated after prosecutor used peremptory strikes to remove prospective black jurors); *State v. Lucky*, 755 So.2d 845 (La. 1999) (entire panel of jurors struck when juror accused prosecutor of using challenges to remove African-American women); *State v. Seals*, 684 So.2d 368 (La. 1996) (all-white jury seated

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in another Jefferson Parish case by a Tulane University professor, who concluded that the racial disparity in the state's use of peremptory challenges strongly supports an inference that the Jefferson Parish District Attorney's Office engaged in racially discriminatory jury selection practices;[7] and a climate of racial insensitivity – if not outright animosity – illustrated by prosecutors' wearing of hanging-noose neckties in trial proceedings against African-American defendant Lawrence Jacob.[8] Although the Louisiana Supreme Court majority recognized that *Miller-El II* prohibited "consign[ing] to history"[9] a prosecutor's historical use of peremptory challenges, it dismissed the significance of Mr. Snyder's historical evidence by complaining that consideration of that evidence "would take us outside the four corners of the appellate record. . . ."[10] This dismissive treatment of historical evidence seems both inflexible and disingenuous, given that most of the evidence in question came from cases decided by the Louisiana Supreme Court itself.

The majority next dismissed the significance of three of the five peremptory challenges the prosecutor exercised

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after the prosecutor struck three African Americans over defendant's *Batson* objection); *State v. Durham*, 673 So.2d 1103 (La. Ct. App. 1996) (same).

[7] This study had been introduced into the trial court record following the Louisiana Supreme Court's reversal on *Batson* grounds in *State v. Harris*, *supra*, and was included as an appendix in Harris' writ application to the Louisiana Supreme Court in *State v. Harris*, Sup. Ct. No. 03-KK-3549.

[8] *See, e.g.*, Jeffrey Gettleman, *Prosecutors' Morbid Neckties Stir Criticism*, THE NEW YORK TIMES, 1/5/03, Section 1; Joe Darby, *Prosecutors' Choice of Neckties Blasted; Noose, Grim Reaper Worn in Murder Case*, THE TIMES PICAYUNE, 1/5/03.

[9] *Snyder III* at 488.

[10] *Id.* at 490 n. 8.

against African-American jurors, announcing that "[t]he court's current task is eased by the winnowing out of some of the challenged jurors." *Snyder III* at 493. The majority reiterated its *Snyder I* refusal to consider the prosecutor's strikes against Greg Scott and Thomas Hawkins because, in its view, these strikes had been waived by trial counsel's failure to raise *Batson* objections to their removal. According to the lower court, "There is nothing in *Miller-El* or *Collins* that casts doubt on the correctness of this portion of *Snyder I*." *Id.* at 493. This statement, however, ignores clear and significant language contained in *Miller-El II*.

It is important to note that defense counsel did not affirmatively "waive" the first two black jurors struck by the prosecutor; she simply waited to make a *Batson* motion until the prosecutor had struck the third African American juror, and failed to specifically object to the striking of those two jurors. Nothing in *Batson* suggests that a *Batson* motion must be made when the first African American juror is struck; nothing in *Miller-El II* says so; and nothing in the Louisiana Supreme Court's previous cases said so. In fact, waiting for more than one strike of an African-American juror to bolster the required prima facie case showing, is likely both common and defensible, especially given the Louisiana Supreme Court's stringent view of the prima facie case step of a *Batson* analysis. *See State v. Weary*, 931 So. 2d 297 (La. 2006) (no prima facie case established where prosecutor struck only one black juror).

Nonetheless, it may have been proper to deem claims *focused* on the first two struck black jurors procedurally defaulted based upon trial counsel's failure, at any time, to object to those strikes. Procedural default in this limited sense has the consequence that Mr. Snyder could not prevail if the *only* discrimination he challenged on appeal

was the striking of jurors he had failed to challenge at trial. But Mr. Snyder properly objected at trial to the striking of three jurors, and *Miller-El II* clearly states that "all relevant circumstances" must be considered in evaluating whether the prosecutor acted with discriminatory motivation in striking any prospective juror. *Miller-El II* at 240. Additional strikes of black jurors, especially ones without any apparent justification in the record, are part of the record, and contribute to an inference of discriminatory purpose. *See id.* at 265 ("It is true, of course, that at some points the significance of Miller-El's evidence is open to judgement calls, but when this evidence is viewed cumulatively, its direction is too powerful to conclude anything but discrimination.") Thus, given that Mr. Snyder properly asserted his challenges to two other jurors (both at trial and upon appeal), in dismissing the evidence of discrimination contributed by the strikes of Hawkins and Scott, the *Snyder III* court ignored *Miller-El II*'s counsel. Likewise, the majority erred when it dismissed the relevance of a third African American juror struck by the prosecutor, this time because Mr. Snyder's brief on remand did not raise arguments specifically addressing her removal. That the prosecutor had struck another black juror was relevant for its statistical import in evaluating the strikes to which Mr. Snyder's counsel had objected. Had the lower court followed this Court's instruction to reconsider in light of *Miller-El II*, it would have had to consider that the prosecutor used his peremptory challenges to remove all five qualified African-American jurors – a pattern even starker than that present in *Miller-El II*.

Justice Johnson, in her dissenting opinion, gave a further, case-specific reason for condemning the majority's determination that the defense lawyers' hesitation in making a *Batson* motion was a waiver. The sequence of

events strongly suggests that defense counsel's failure to challenge those strikes when the prosecutor made them was prompted by the prosecutor's devious tactic of accepting the first black juror – and then "backstriking" him later. As Justice Johnson explained, "the prosecutor's action in accepting the first African-American juror [Brooks] seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions." *Id.* at 506 (Johnson, J., dissenting) (quoting *Snyder I*, 750 So. 2d at 866) (Johnson, J., dissenting)). Justice Johnson further observed that the prosecutor's use of a backstrike to remove Brooks in this case paralleled the Texas "jury shuffle" procedure this Court found so suspicious in *Miller-El II*. *Id.* at 508 (Johnson, J., dissenting).

Having transformed five struck African American jurors into two, the majority proceeded to adopt without modification – or reference to *Miller-El II* – its analysis of the remaining jurors. It noted that "[d]espite defense counsel's reiteration of the argument concerning the remaining two potential jurors, we turn to our previous decision regarding these persons," *id.* at 493, and then quoted extensively from its earlier opinion. *Id.* at 493-95 (quoting *Snyder I, supra*, 750 So. 2d at 840-42). Thereafter, the majority observed, "we . . . find nothing [in the voir dire transcript] to disparage the above quoted *Batson* analysis conducted by this court in *Snyder I*." *Id.* at 494.

Noting that "the peremptory challenge of Brooks requires a more detailed discussion than the challenge of [Elaine] Scott," *id.* at 496, the majority elaborated on its *Snyder I* reasoning with respect to the striking of Jeffrey Brooks.[11] According to the majority, the prosecutor's claim

[11] Although Mr. Snyder's petition convincingly sets out reasons to believe that the prosecutor's stated reasons for striking Elaine Scott, as

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that he struck Brooks because of his student teaching schedule was not pretextual, despite the fact that he did not strike white jurors who reported scheduling conflicts;[12] the difference, said the majority, was that the scheduling conflicts identified by prospective white juror Sandras and seated white juror Yaeger arose because Brooks was a student, while "both of these men were employed and apparently already had established careers." *Id.* at 496. It then distinguished white juror McMurray's concerns with service on a different ground; hers, the majority said, were focused on childcare problems, rather than her court-reporting classes at Franklin College. *Id.* at 496 n. 16. It is impossible to square this pointillist approach to comparative juror analysis with this Court's opinion in *Miller-El II*, which rejected the dissent's insistence that white panelists are only similarly situated to a struck black juror when they are "identical in all respects," *Miller-El II* at 247 n. 6,

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well as his stated reasons for striking Jeffrey Brooks, were pretexutal, *amicus curiae* focus here on Brooks because the Louisiana Supreme Court's treatment of the evidence concerning Brooks is jarringly inconsistent with this Court's treatment of similar evidence in *Miller-El II*, and provides the strongest support for an inference of recalcitrance.

[12] Prospective white juror Michael Sandras taught at the University of New Orleans and expressed concern that classes had "just started yesterday and it's the beginning of the semester; so any prolonged absence, it becomes a real problem." R. 982. He acknowledged that concern for his classroom obligations would create difficulties for him in concentrating, and that he would "have to somehow pass on the information concerning work." *Id.* Despite his expressions of these concerns, the prosecutor never asked Sandras any questions about *his* commitments, distractions, or motivations to end the trial quickly.

Prospective white juror Arthur Yaeger expressed concern that jury service would interfere with his "longstanding commitment to an event that's going to take place on Sunday that I've been an integral part of for many years." R. 983. The prosecutor neither questioned Yaeger about his concern nor challenged him.

reasoning that "potential jurors are not products of a set of cookie cutters." *Id.* Instead, this Court found "strong similarities" probative of discriminatory intent. *Id.* at 247.

In contrast to the *Snyder III* majority, Judge Kimball tracked this Court's *Miller-El II* approach to comparative juror analysis. She reasoned that the prosecutor's failure to question Brooks about the impact of his teaching schedule on his ability to serve, considered with his apparent disinterest in the scheduling conflicts of other white prospective jurors, revealed that "there was no pre-strike foreshadowing of genuine State concern over the possibility of Mr. Brooks having time-schedule anxieties [and] no attempt made by the State to verify its hypothesis and develop an objective basis for its strike." *Id.* at 502 (Kimball, J., dissenting). There is no plausible excuse for the lower court majority's failure to adopt her approach to the prosecutor's first proffered reason for striking Brooks.

The Louisiana Supreme Court majority's treatment of the prosecutor's second proffered reason for striking Brooks also deviates from *Miller-El's II* commands. The prosecutor alleged that Brooks was "very nervous," an assertion that was belied by both the absence of any confirmation by the trial judge (despite defense counsel's protest that Brooks had displayed no nervousness), and by the engaged responses Brooks provided to questions from both parties. The lower court first asserted that because "nervousness cannot be shown from a cold transcript, . . . the judge's evaluation must be given much deference," *id.* at 496, a proposition that might be true in some cases, but in this case was impeached by Brooks' apparent engagement in the voir dire process, and "voluble" responses to questions.[13]

[13] As the dissent observed, the record reflected "that Mr. Brooks was an engaged and voluble juror throughout voir dire examination.

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Then the majority creatively reshaped the prosecutor's assertion into something less transparently impeachable: it reasoned that "the fact that Brooks was articulate during the voir dire may have contributed to the prosecutor's fear that he would get 'smart' during jury deliberation and suggest a verdict lesser than the death penalty." *Snyder III* at 496. Such creativity, however, is prohibited by *Miller-El II*, which held that "A prosecutor simply has got to state his reasons as best he can and stand or fall on the reasons he gives. . . . If the stated reason does not hold up, its pretextual significance does not fade because a trial judge or an appeals court can imagine a reason that might not have been shown up as false." *Miller-El II* at 252.

Finally, the *Snyder III* majority dismissed as irrelevant the prosecutor's pretrial comments and penalty phase argument comparing this case to O.J. Simpson's case by the incredible declaration that those comments lacked racial content. As discussed in Point II, that declaration defies common sense as well as racial realities in this country. In contrast, Justice Kimball, joined by Chief Justice Calogero, concluded that the "voir dire began against a backdrop of the issues of race and prejudice when the State made references to the O.J. Simpson's case," and that the prosecutor's pretrial assurances to the trial court "that he would not refer to O.J. Simpson during the voir dire and evidentiary portion of trial . . . appear disingenuous because the prosecutor clearly referenced the O.J. Simpson case during its rebuttal argument at the penalty phase of trial." *Id.* at 501 (Kimball, J., dissenting);

"*Snyder III* at 502 (Kimball, J., dissenting) "In the absence of the trial court's independent and particularized assessment of Mr. Brooks's demeanor, a reviewing court can only look to the record, which seems to indicate a lack of nervousness and uncertainty on the part of Mr. Brooks." *Id.* at 503 (Kimball, J., dissenting).

see also id. at 506 (Johnson, J., dissenting) (quoting *Snyder I*, 750 So. 2d at 506) (Johnson, J., dissenting)) ("The prosecutor's discriminatory intent in excluding all African-Americans from the jury was evidenced by his reference to the O.J. Simpson trial during closing arguments.")

Justice Kimball, who had written the majority opinion in *Snyder I*, upon reconsidering in light of *Miller-El II*, concluded that "a review of the entirety of this record performed using the vigorous analysis directed by the *Miller-El* Court reveals the trial court erred in allowing the State to peremptorily challenge Mr. Brooks." *Id.* at 100 (Kimball, J., dissenting). Given the history of discrimination in Jefferson Parish; the prosecutor's use of his peremptory challenge to strike all five of the African American jurors who had survived for-cause challenges; the prosecutor's use of a backstrike to eliminate African American juror Jeffrey Brooks; the prosecutor's reliance on two reasons for that strike, both of which were impeached by the record, as well his extraordinary summation, in which he urged the all-white jury he had created to impose death because the Snyder case was like the O.J. Simpson case, where the defendant "got away with it;" and given this Court's opinion in *Miller-El II* – no other conclusion seems possible for a lower court acting in good faith. The Louisiana Supreme Court's decision "correlates with no fact as well" as with defiance. *Cf. Miller-El II*, 545 U.S. at 266 ("The strikes correlate with no fact as well as they correlate with race. . . .").

IV. Race-Based Recalcitrance Demands Correction By This Court.

Just as "[i]t blinks reality to deny that the [Texas prosecutor] struck Fields and Warren . . . because they

were black," *Miller-El II* at 266, it blinks reality to deny that the Louisiana prosecutor who struck all five of the qualified potential black jurors struck none of them because they were black. Yet, the Louisiana Supreme Court blinked this reality, contrary to the direct instruction of this Court.

Miller-El II and *Snyder III* share an issue particularly likely to increase resistance to this Court's rulings: race. In the history of resistance to Supreme Court commands, the most notorious episode of all involves race. Certainly the most widespread, protracted, and violent resistance to this Court's power came in the aftermath of *Brown v. Board of Education*, 347 U.S. 483 (1954), which declared that racially segregated schools violate the Equal Protection Clause of the Fourteenth Amendment. In a story so well-known it needs no footnotes, this Court stayed its course and insisted on adherence to its commands. After widespread footdragging and intransigence from many school boards across the South, the Governor of Arkansas blocked an integration plan approved by the federal courts in pursuance of *Brown*'s mandate. The governor backed off for a brief time, but integration was again halted when the Little Rock school board sought and was granted a long postponement of the desegregation plan. In an opinion signed by all nine justices, this Court rejected that postponement and rejected Arkansas' contention that it was not bound by the *Brown* ruling since it had not been a party to the *Brown* litigation. As this Court forcefully declared, "[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land," which binds "every state legislator and executive and judicial officer . . . " *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

Race-based recalcitrance is particularly dangerous to the Constitution and to this Court. Whether or not the

Louisiana Supreme Court's insubordination in this case stems in part from the fact that a capital conviction is involved, or wholly from the racial issues at stake, that insubordination must be rooted out. This case provides further evidence for the existence of race-based recalcitrance, as well as a clean vehicle for addressing that recalcitrance.

CONCLUSION

A prosecutor should not be permitted to purge a capital jury of African American jurors in order to address his racist argument to an all-white panel, and he should not be permitted to hide behind his bare assertion of race-neutrality in the face of a comparative juror analysis that reveals pretext. A state court cannot by fiat bleach out the patent racial content of that argument. It should not be permitted to defy this Court's remand order and ignore the premeditated violation of the Equal Protection Clause plain on the record in this case. This Court should grant certiorari and affirm its authority, either by a summary reversal, or by plenary review of the case.

Respectfully submitted,

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